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Supreme Court, U.S.
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No. 94-1959

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

GLORIA B. WILLIAMS,

Petitioner,

V.

DAVID A. GARRAGHTY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Supreme Court of Virginia err in finding that Title VII of the Civil Rights Act of 1964 was not implicated in Williams' rejected jury instruction in Respondent's state defamation suit?

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

Your Respondent, David A. Garraghty, respectfully requests this Court to deny the Petition for Writ of Certiorari submitted by Petitioner, Gloria B. Williams, who seeks review of the Supreme Court of Virginia opinion of March 3, 1995, Williams v. Garraghty, ___Va. _____, 455 S.E.2d 209 (1995), and which is reprinted in the Petition for Writ of Certiorari at Appendix A.

STATEMENT OF THE CASE

I. Background

David A. Garraghty began his employment with the Department of Corrections in 1972. (J.A. 318)[1]. Williams had known Garraghty for most of the time he had been with the Department of Corrections (J.A. 26). Garraghty had been a Warden with the Department of Corrections, first starting at Deep Meadow Correctional Center in 1980 until 1982. In 1982 he opened the Brunswick Correctional Center where he was Warden and where Williams was his personnel officer. They worked together at Brunswick Correctional Center from 1982 until 1984. In 1984 Garraghty was assigned by the Department of Corrections to open the new Nottoway Correctional Center as Warden. With this new move he brought along Williams as his personal director to Nottoway. (J.A. 27, 30, 317). According to Garraghty, he and Williams dated for approximately six months in 1984. (J.A. 322-323).

While at Nottoway Correctional Center, Garraghty experienced a number of conflicts with then Governor Robb and his administration which resulted in a confidential memo of September 3, 1985 from then Secretary of Public Safety,

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[1]J.A. reference herein is to the Joint Appendix filed in the Supreme Court of Virginia.

Andrew Fogerty, to Governor Robb. (J.A. 631-634).

The aforementioned memo outlined how the Department of Corrections' Director, Allen Sieloff, had been actively seeking to document a case of insubordination and inappropriate behavior against Mr. Garraghty for the purposes of terminating him. Much to Sieloff's frustration, however, recent advice from the Attorney General's office indicated that absent overtly, insubordinate, inappropriate behavior by Garraghty, the Director may be enjoined from termination upon a suit alleging that Garraghty's First Amendment rights had been abridged. (J.A. 633-644).

The plan at the time was to move Garraghty from the Nottoway Correctional Center to the Central Office in Richmond. At that time Mr. Ed Murray was Mr. Sieloff's Deputy Director. (J.A. 631).

As of 1992, Williams knew the attitude of the administration of the Department of Corrections towards Garraghty. Williams stated: "I don't know that there were many people that didn't". Williams testified regarding the attitude that the hierarchy had at the Department of Corrections and stated: "He wasn't one of their favorite people I'm sure". (J.A. 120)

Williams remained the personnel officer at Nottoway Correctional Center from 1984 until approximately July of 1989 when she left the Department of

Corrections after marrying and moving with her husband to the West Coast. (J.A. 338). Williams returned to the Department of Corrections' Central Office in March of 1990. She then returned to Nottoway Correctional Center in November of 1990, again as Garraghty's personnel officer, after having applied for that position in September of 1990. (J.A. 711).

Upon Williams' return in November of 1990 as personnel officer for Nottoway Correctional Center, she began her employment off on a good foot. However, over the next year employment deficiencies were noted in regards to her performance. Part of Williams' performance problems involved her failure to develop Internal Operation Procedures (IOPs) for the correctional unit, as well as her attendance problems at the Correctional facility. Garraghty wrote to Williams a formal counseling memo on December 6, 1991 about the aforementioned specific problems.

During this time period, the Nottoway Correctional Center was conducting quarterly performance evaluations of its employees. Garraghty was responsible for reviewing Williams' performance evaluation annually and on a quarterly basis. Williams' last annual performance evaluation was October of 1991, and her most recently quarterly evaluation was February 2, 1992. Williams was next scheduled for her quarterly performance evaluation on or about the first week of May 1993, and it appeared that she had

concerns that this evaluation was going to reflect a continuation of the on-going problems previously documented in her quarterly and annual reviews.

II. The Defamatory Letter of May 1, 1992

On March 17, 1992 Garraghty was sick and did not come into work that day, remaining in his Warden's home just off the Correctional facility's main compound. At that time he called in to the personnel office to ask to have his assistant, David Robinson, deliver to his home his paycheck. Williams took Garraghty's call and told Garraghty that she would be happy to bring it to his home. Garraghty said that would be fine, and she could drop it off in his mailbox. Instead, Williams insisted to come to Garraghty's home to discuss with him some institutional matters.

It was at this meeting at Garraghty's home that Williams alleged that Garraghty asked her if she wanted to "mess around". (Pet.A-30). Garraghty throughout this matter has denied any such conversation took place. Thereafter, Garraghty and Williams continued their talk at Garraghty's home, and Williams left a short time later.

On the morning of May 1, 1992, Garraghty came into his office and found a white envelope on his desk addressed to

Dave. Garraghty opened the envelope and read Williams' undated letter to Garraghty which was addressed to him on the Department of Corrections letterhead (See Pet. A-30). Garraghty had never heard of any of the claims in the letter before May 1, 1992, such as Williams being hospitalized for an angina attack due to the stress while working for Garraghty at the Department of Corrections prior to 1989 or because of his prior sexual harassment as being the reason why she left in 1989.

After reading the letter Garraghty called into his office one of his employees, a woman named Kern Gillian, to read the letter. Gillian read the letter and was present at the time Williams was called into Garraghty's office to discuss the letter. At that time Garraghty also discussed with Williams his concern about her on going work performance deficiencies. During this meeting, Williams was asked by Garraghty what did she want to do with the letter and Williams replied she did not know what she wanted to do. Immediately after the meeting was concluded, Garraghty self reported himself to his immediate supervisor, Richard Young, by telephone and by letter.

After the meeting Williams called Paul Broughton, the manager of the Employee Relations Department of the Department of Corrections and told him the meeting with Garraghty did not go well.

Williams took no further action in regards to her issues raised in her letter to Garraghty. Though she had years of training as a personnel officer with the Department of Corrections, she filed no grievance against Garraghty with the Department of Corrections, nor did she file any complaint with the State office of Equal Opportunity Employment Service (EOES), nor did she file with the Equal Opportunity Employment Commission. (J.A. 698).

As a result of Garraghty's self reporting of the incident to the Department of Corrections, the Director, Ed Murray, ordered an internal investigation. As a result of the internal investigation, Garraghty was terminated by Ed Morris, the Deputy Director of the Department of Corrections, on August 25, 1992, effective September 25, 1992, without any meaningful pre or post termination hearing where he confront and examine his accusers.[2]

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[2]In 1985, in part as a result of Garraghty's criticism of the Robb administration, the General Assembly of Virginia amended the Virginia Personnel Act and excluded Wardens and superintendents of the Department of Corrections from participating in the State's Grievance Procedure. This became effective July 1, 1985. This particular provision of the amendment to the Virginia Personnel Act was known as the "Garraghty Bill".

At the time of his termination in August of 1992, Garraghty consistently asked the Department of Corrections for a grievance panel hearing to challenge his termination. The Department of Corrections denied his request stating that he was an exempt employee.

Thereafter, in December of 1993 Garraghty brought an action in the United States District Court for the Eastern District of Virginia, Richmond Division, pursuant to 42 U.S.C. §1983 against the Department of Corrections, Director Murray, Deputy Director Morris, Paul Broughton, Richard Young, and two internal affairs investigators, Zimmerman and Moore, alleging deprivation of due process rights (property and liberty interests), First Amendment rights, and breach a State breach of contract claim.

Thereafter, the Defendants filed a Motion for Summary Judgment alleging qualified immunity. The United States District Court in June of 1994 denied the Defendants' claim of qualified immunity, to which the Defendants took an interlocutory appeal by right to the Fourth Circuit Court of Appeals on the issue of qualified immunity.

The Fourth Court of Appeals in its decision of May 9, 1995, Garraghty v. Commonwealth of Virginia, 1995 U.S. App. LEXIS 10478, (4th Cir. Ct. 1995), sustained the District Court's ruling of denial of qualified immunity and remanded

Garraghty was allowed to have a review of the termination by Director Murray, who undertook the review and upheld the termination in October of 1992. Garraghty was afforded the opportunity to have his termination reviewed by then Secretary of Public Safety, O. Randolph Rollins.

During the time period that Rollins was reviewing Garraghty's termination, Garraghty initiated his State cause of action against Williams by filing a claim of defamation, intentional infliction of emotional distress, and negligent infliction of emotional distress against Williams in the Circuit Court of Nottoway County in November of 1992.

During the pendency of Garraghty's State claim, Rollins, by letter of April 4, 1993, modified Garraghty's termination and ordered his reinstatement as a Department of Corrections employee, ordered his demotion from Grade 17 to Grade 16, ordered a thirty day suspension, ordered his removal as Warden of Nottoway Correctional Center, and placed him in a make-work position in the Central Office of the Department of Corrections.

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the case back to the District Court where the matter has now been set for trial for September 7 and 8, 1995.

III. State Court Action

The State Court action by Garraghty against Williams went to trial on August 23-25, 1993, on Garraghty's claim of common law defamation and a claim of insulting words pursuant to §8.01-45 of the Code of Virginia (1950), as amended, for Garraghty's "non-personal" damages, the Trial Court having ruled that Garraghty's claim for personal damages for defamation and insulting words, as well as intentional and negligent infliction of emotional distress were all barred by the exclusive jurisdiction of the Virginia Workers' Compensation Act.[3]

At the trial there was no evidence that Williams was asserting a claim of sexual harassment with anyone. Williams' own testimony states that she never made any kind of formal complaint to the Department of Corrections, that she never intended to make a claim, and has never filed any kind of complaint or suit or anything of any nature with any authority as a result of the events alleged in her letter of May 1, 1992. (See J.A. 511-512).

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[3]This ruling was found to be in err and was reversed by the Supreme Court of Virginia, but was not remanded. (Pet. A-17-18).

Further during the trial, Williams presented little, if any, evidence in support of the facts alleged in her memo of May 1, 1992. Likewise, Williams was unable to rebut any of the evidence brought by Garraghty showing that her allegations were false and malicious.

Thereafter, in preparation of the Jury Instructions, Williams attempted to introduce her Instruction No. 2. In Instruction No. 2 Williams states that her May 1, 1992 letter was privileged because she has a right under federal law to be free from sexual harassment and acts of retaliation for asserting a claim of sexual harassment and to protect this right by seeking redress from any violation of it. (See Pet. A. A-28).

Further, Williams sought to state that the law of qualified privilege is abused when the Plaintiff proves by clear and convincing evidence that (2) "Defendant made the statement because of hatred, ill-will, or desire to hurt the Plaintiff, rather than to seek redress for what the Plaintiff (sic), perceived in good faith, to be a violation of her rights".

The Trial Court rejected the argument of Williams that there was a federal issue involved, or that it was a correct statement of the law as it related to the issues and facts at trial. Instead, the Trial Court granted Garraghty's Instruction No. 12. (See Pet. A 27).

Upon submission of the Instructions to the Jury, it returned a verdict against Williams for compensatory damages in the amount of $152,597.00 and punitive damages in the amount of $125,000.00.

Thereafter, the Trial Court confirmed the Jury's verdict, but reduced the punitive damages from $125,000.00 to $25,000.00. Both Williams and Garraghty appealed the Trial Court's rulings contrary to their interest to the Supreme Court of Virginia. (Pet. A-22-26).

The Supreme Court of Virginia affirmed the Trial Court's ruling as to the instructions at issue, and rejected Williams' claim of err. The Virginia Supreme Court stated that even if the present case were a Title VII proceeding, Williams would not have been immunized from a State defamation action. (See Pet. A-11-12).

SUMMARY OF THE ARGUMENT

Where Williams writes Garraghty a defamatory letter, and where Garraghty has shown such by clear and convincing evidence that the same is false and malicious, and when Williams never intended to make either a formal or informal complaint of sexual harassment with anyone, she has not asserted any right under federal law which would permit the giving of her qualified privilege Jury Instruction (No. 2).

Even if she should have been allowed to have her instruction given, it would have made no difference in the outcome of the case.

REASONS FOR DENYING THE WRIT

Argument

I. Virginia Supreme Court Ruling Is The Correct Statement of the Law.

The Virginia Supreme Court considered Williams' contention the Trial Court erred in granting Garraghty's instruction on qualified privilege and rejected Williams' proffered instruction thereby denying her the qualified privilege to assert her right recognized by federal law to be free from sexual harassment.

The Virginia Supreme Court rejected Williams' contention based on the facts of the case. Further, the Court stated that even if the case were a Title VII proceeding, Williams would not have been immunized from Garraghty's State defamation action, citing Barticula v. Paculdo, 411 F. Supp. 392, 397 (W.D. MO 1976).

Williams goes on to argue that the Virginia Supreme Court's decision is in conflict with cases that have addressed this issue in the Federal Circuit Court, as well as the conflict within the Federal Courts. (See Williams' footnote 3 Pet. A-8).

Rule 10 of the Rules of the Supreme Court of the United States states in relevant part that:

> "(a) Petition for Writ of Certiorari will be granted only when there are special or important reasons therefor. The following, while neither controlling or fully measuring the Court's discretion, indicate the character of reasons that will be considered; ...
>
> (b) when a State Court of last resort has decided a federal question in a way that conflicts with the decisions of another State Court of last resort or of a United States Court of Appeals.
>
> (c) states: When a State Court ... has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court".

As to the two foregoing criteria, while neither controlling nor fully measuring this Court's discretion, Williams has utterly failed to point out exactly what conflicts arise between the Virginia Supreme Court's decision in the instant case, and that of any United States Court of Appeals. Further,

Williams has failed to point out where the instant Virginia Supreme Court decision represents an important question of federal law which has not been but should be settled by this Court, or has decided a federal question in a way which conflicts with applicable decisions of this Court.

II. A Virginia Supreme Court Opinion Is Not In Conflict with Interpretation of the Opposition Clause by the Federal Judiciary.

Williams argues that her proffered Instruction No. 2 is supported by Federal District Court decisions of Coleman v. Wayne State University, and EEOC v. Virginia Carolina Veneer Corporation.

Williams is mistaken. There is a clear distinction between the instant case and the cases cited by Williams.

In Coleman v. Wayne State University, 664 F. Supp. 1082 (E.D. MI 1987), the Trial Court found that it was the Defendant's intent to retaliate against Coleman for "making a commotion about racism and lack of compliance with affirmative action at the University". Coleman, supra. at p. 1093. A review of Coleman's case shows that he was involved in affirmative action groups, testified before legislative committees, and he protested that he was constantly harassed at his job over a long period of time. Coleman's commotion about racism and lack of compliance about affirmative action

resulted in his filing a complaint with the EEOC and a subsequent lawsuit.

Williams' reliance upon EEOC v Crown Zellerbach Corporation, 720 F.2d 1008 (9th Cir. 1983), is misplaced. In Crown Zellerbach black employees filed complaints with the EEOC and engaged in several other protest measures. They formed an organization entitled "the concerned black Zellerbach employees" and wrote letters to elected officials at the federal, state and local levels.

Clearly, the Coleman and Crown Zellerbach cases are distinguished from the instant case on their facts as well as the law involved, especially here where Williams never intended to make any complaint and where it was shown her allegations in her May 1, 1992 letter were false and malicious.

Williams also claims that the Virginia Supreme Court decision stands in irreconcilable conflict with precedents of the Federal Circuit Courts. For this proposition, Williams would rely on Garziano v. E. I. DuPont De Nemours and Co., 818 F. 2d. 380 (5th Cir. 1987). (Pet. p. 11). Interestingly, a review of Garziano finds Williams is mistaken as there was no discussion of the "opposition clause". Further, the case was not only reversed, as pointed out by Williams, but was remanded for determination of whether qualified privilege was abused by excessive publication, under Mississippi law.

III. Jury Instruction Was Proper.

No where does Williams argue that having her jury instruction granted would have resulted in a different verdict in this case.

There was overwhelming evidence for the Jury to find that Williams knew the statements she made were false or that she made it with reckless disregard of whether it was false or not. (compare Instruction No. 12 (1) with Instruction No. 2 (1) A. A-27, A-28).

The punitive damage Jury Instruction No. 15 given in this case and cited at App. A-1 herein, follows the above quoted language and required the Jury to find (again) by clear and convincing evidence that the Defendant made the statements with actual malice; that is, she knew they were false or she made them so recklessly as to amount to a willful disregard for the truth, ...".

When comparing the punitive damage instruction with paragraphs 1 and Garraghty's Instruction No. 12, and Williams' Instruction No. 2, respectively, it appears clear that even if Williams' Instruction No. 2 would have been given, that Garraghty would have been able to overcome any qualified privilege Williams' asserted. Further, the punitive damage instruction addresses the issue of good

faith which is raised in Williams' Instruction No. 2 (paragraph 2). Thus, even if this Court finds there was err by the Trial Court in not giving Williams' instruction, the err appears totally harmless. Further, Williams has not argued that Garraghty could not bring his defamation action, only that the Jury should have been told that Garraghty had to show an abuse of Williams' privilege to assert her right under federal law to be free from sexual harassment and form acts of retaliation for asserting a claim of sexual harassment.

Garraghty overcame that privilege by showing Williams' assertion of that privilege was false or made with reckless disregard of whether or not it was false.[4] This confirms the Virginia Supreme Court's reliance on Barticulia v. Paculdo, 411 F. Supp. 392 (W.D. Mo., 1976) where the United States District Court stated at 379: "it would required a torture construction of Title VII, in 2000e-3(a) to say that it permitted defamatory and liableous statements in guise of protecting employees rights to oppose unlawful employment practices".

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[4]The Jury also heard from Williams' employer who investigated her allegations against Garraghty. Obviously, the Jury found no "merit" to Williams' complaint. (Compare Petition Argument p. 14).

IV. No Violation of Supremacy Clause.

Williams would have this Court believe that under the facts of this case, there is a clear conflict between the federal protection afforded employees to oppose prohibitive discrimination in the work place under Title VII and the limitation of Virginia law of qualified privilege for employees who complain of their supervisor's conduct. Williams goes on to state that because the narrow privilege provided by State law has the affect of defeating the broad protection afforded by the opposition clause, and that the former must yield to the latter.

Interestingly enough, Williams cites no law to support such proposition. There is no indication in the legislative history of the opposition clause that this is the design of the clause, nor is there any indication that the opposition clause should eliminate a citizen's at least equal, if not greater, and fundamental right to protect his good name and reputation by bringing a defamation action, even in the presence of a Title VII claim.

In the instant case Williams made an allegation against Garraghty that resulted in a devastating affect of Garraghty being terminated from a twenty-year career without any hearing to protect his property or liberty interests (good name and reputation). Williams took no risk of going to the EEOC and filing under oath the defamatory statements she had in her

letter of May 1, 1992, which would have subjected her to perjury. Further, Williams knew that Garraghty was exempt from the State's Grievance Procedure and therefore could not engage her claims in the form of a grievance panel hearing.

The only forum left to Garraghty was to seek redress for such scurrilous language by filing his defamation action in the appropriate State Court. Garraghty did so well after the 180 day period in which Williams could have filed her claim with the EEOC. Further, once Williams was sued in State Court, she never claimed that Title VII was an absolute bar to Garraghty's defamation claim. She only claimed a qualified privilege. The Trial Court heard her federal law arguments and based on the facts of the case, rejected the same when giving the jury instructions which are at issue.

Like the Trial Court, the Virginia Supreme Court also rejected Williams' argument, as should this Court by denying Williams' Petition for Writ of Certiorari.

CONCLUSION

As Justice Powell said in Rankin v. McPherson, 483 U.S. 378 (1987), at 392: "It is not easy to understand how this case has assumed constitutional dimensions and reached the Supreme Court of the United States".

Contrary to Williams' assertion, this case raises no important issues, the resolution of which would be necessary to preserve the protection of Title VII to employees asserting their rights to a work environment free of sexual harassment.

Title VII affords plenty of protection for Williams and others similarly situated. However, Williams never chose to seek Title VII protection, especially here where she had superior knowledge of Title VII arising from her position as personnel officer of Nottoway Correctional Center.

Williams' testimony that she never intended to make a claim or never filed any kind of claim with anyone is exactly why this Court should not do what Williams herself refused to do, and that is to raise her utterly false and malicious concern of sexual harassment to the level of a federal question.

Accordingly, this Court is respectfully asked to deny Williams' Petition for Writ of Certiorari.

Respectfully submitted,

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Plaintiff's Instruction No. 15

If you find that the plaintiff is entitled to be compensated for his damages, and if you further believe by clear and convincing evidence that the defendant made the statements with actual malice; that is, she knew they were false or she made them so recklessly as to amount to a willful disregard for the truth, then you may also award punitive damages to punish a defendant for her actions and to serve as an example to prevent others from making such statements in the future.

If you award punitive damages, you must state separately in your verdict the amount you allow as compensatory damages and the amount you allow as punitive damages.

VMJI - Defamation - No. 37.110
Given JFD